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Nos. 96-1377 & 96-1526

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

Aetna Health Plans of California, Inc., *et al.*,

Petitioners,

v.

William Ardary, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONERS' REPLY TO OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Stuart M. Gerson
Counsel of Record
William A. Helvestine
Michael T. Horan
David M. Pierce
Epstein Becker & Green, P.C.
1227 25th Street, N.W.
Washington, D.C. 20037
(202) 861-0900
Counsel for Petitioners

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INTRODUCTION

Respondents marked avoidance of the issues actually raised in the Petition punctuates the reasons why the writ should be granted. When Respondents' mischaracterization of the case is corrected, their effort is fairly seen as an end run around what was intended by Congress, and held previously by this Court, to be an exclusively-federal dispute resolution scheme. Clearly, the Ninth Circuit has misapplied this Court's decisions in *Weinberger v. Salfi*, 422 U.S. 749 (1975), *Heckler v. Ringer*, 466 U.S. 602 (1984) and *Schweiker v. Chilicky*, 487 U.S. 412 (1988), and clearly the Ninth Circuit's opinion has caused a split among the circuits on the points raised herein.

The Ninth Circuit's decision improperly redirected federal caselaw by permitting Respondents' wrongful death action. In light of the potential impact that that decision could have on cases that ultimately will be brought among both present Medicare enrollees and the 80,000 new enrollees per month who enter Medicare-covered health maintenance organizations ("HMOs") across the country, this Court's review of that decision is vitally necessary.

REASONS FOR GRANTING THE WRIT

I. IN FABRICATING A NEW REMEDY FOR RESPONDENTS, THE NINTH CIRCUIT FLATLY MISAPPLIED THIS COURT'S DECISIONS IN *WEINBERGER V. SALFI*, *HECKLER V. RINGER* AND *SCHWEIKER V. CHILICKY*.

The Ninth Circuit flatly misapplied this Court's standard in *Salfi* and *Ringer* for determining when a claim "arises under" the Medicare Act. By permitting Respondents' wrongful death action, the Ninth Circuit provided Respondents with a remedy outside the congressionally-mandated exclusive remedial scheme, in direct contradiction of *Chilicky*. That scheme cannot be avoided merely because Respondents seek a remedy for which the Medicare Act makes no provision.

A. In devising a limited review process, Congress fashioned the remedies it deems necessary and exclusive to effectuate the uniform Medicare benefits process.

Remedies at law or equity are defined only by reference to principles established in caselaw or statute. With reference to the instant case, § 405(h) sets forth the exclusive avenue of

redress delineated by this Court's decision in *Salfi*, *Ringer*, and *Chilicky*. The Ninth Circuit's decision misapplied these standards and bypassed that congressionally-mandated remedial scheme.

In *Salfi* and *Ringer*, this Court assigned a broad application of the phrase "arising under" the Medicare Act to enforce faithful adherence to the jurisdictional preemption provision of 42 U.S.C. § 405(h). Thus, in *Salfi* this Court held that § 405(h) "extends to any 'action' seeking 'to recover on any (Social Security) claim' -- irrespective of whether resort to judicial processes is necessitated by discretionary decision of the Secretary." *Salfi*, 422 U.S. at 762. *See also Ringer*, 466 U.S. at 615 ("arising under" language is to be construed "quite broadly"). Accordingly, a claim predicated on a Medicare benefits determination is subject to the jurisdictional preemption provision of § 405(h), even if no statutory remedy is available.

Indeed, this Court has made abundantly clear that "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for . . . violations that may occur in the course of its administration, we have not created additional . . . remedies." *Chilicky*, 487 U.S. at 423. The Ninth Circuit simply ignored this basic principle and, contrary to congressional pronouncement, gave Respondents access to a forum -- a state court jury trial for consequential damages -- which Congress has foreclosed. This Court's intervention is thus necessary to redirect federal caselaw back to the course it set in *Salfi*, *Ringer*, and *Chilicky*.

B. The Ninth Circuit misapplied *Salfi*, *Ringer*, and *Chilicky* because it ignored that Respondents' claim is predicated on the finding of a "wrongful" administration of Medicare benefits.

The Ninth Circuit's misapplication of this Court's standards becomes clear upon close scrutiny of Respondents' supposed wrongful death claim. Under California law, the success of that claim would require an adjudication that Petitioners wrongfully or negligently denied the Medicare benefit at issue in this case. *See* California Code of Civil Procedure, § 377.60 (1996) (a cause for wrongful death lies if death was "caused by the wrongful act or neglect of another").

Whether Petitioners acted "wrongfully" or "negligently" in the administration of Medicare benefits is a determination framed solely by reference to the Medicare Act. Accordingly, notwithstanding Respondents' insistence that they brought a tort claim, not a Medicare benefits claim, any litigation on the facts presented necessarily depends upon a determination that "arises under" the Medicare Act, as described in *Salfi*. And *Salfi's* deference to the jurisdictional bar of § 405(h) is precisely what Congress described in creating an administrative remedy by which to contest the administration of Medicare benefits. *See Hooker v. United States Department of Health and Human Services*, 858 F.2d 525, 529-30 (9th Cir. 1988) (alleged wrongful termination of decedent's social security benefits which allegedly caused his suicide was barred by exclusivity of remedy provision in social security laws).

Again, merely because Respondents seek a particular remedy for which the Medicare Act makes no provision, they are not exempted from the operation of the Act's jurisdictional

bar. The Ninth Circuit might have followed its heart in cobbling a different remedy for Respondents than that which Congress intended, but it did not follow the law. This Court should grant the writ to correct this error which, left unattended to, will create a precedent shunting thousands of Medicare-HMO cases from the exclusive system intended by Congress to the whims of tort juries and awards of consequential and punitive damages in the State courts.

II. THE NINTH CIRCUIT'S DECISION CREATES A SPLIT IN THE CIRCUITS WHICH SHOULD BE RESOLVED BY THIS COURT.

Contrary to Respondents' caviling, the Ninth Circuit's decision herein has created a split among the circuits as to whether state law actions seeking both Medicare benefits determinations and consequential damages are preempted by federal law. Indeed, the Ninth Circuit, in this case, disagreed openly with the Seventh Circuit's decision in *Bodimetric Health Services, Inc. v. Aetna Life & Casualty*, 903 F.2d 480 (1990), and the division created thereby is unlikely to be resolved by future adjudication in those courts.

The Ninth Circuit could hardly have been more explicit in rejecting the Seventh Circuit's interpretation of § 405(h), when it stated that the Seventh Circuit's reasoning "certainly do[es] not suggest, at least to this court, that [the Seventh Circuit's view of the law] is the standard for making the critical judgment call about what 'arises under' the [Medicare] Act." *Ardary v. Aetna Health Plans of California, Inc.*, 98 F.3d 496, 501 (1996). In other words, had this case been brought in the Seventh Circuit, it would have been dismissed for lack of jurisdiction; because it was brought in the Ninth, it lives on.

Respondents contend that there is no split because they claim that no other federal case has addressed § 405(h) *as it applies to HMOs*.[1] Respondents' Brief in Opposition, at 7. That is a distinction without any material difference in the law. It is wholly irrelevant whether a Medicare benefits determination is made by an HMO or by a Medicare intermediary. In either case, the § 405(h) jurisdictional bar applies to *all claims* predicated on such a benefits determination. *Compare* 42 U.S.C. § 1395mm(c)(5)(B) (a dissatisfied HMO enrollee is entitled to judicial review *of Secretary's final decision* pursuant to § 405) with, *e.g.*, 42 C.F.R. § 405.710(b) (fiscal intermediary determinations subject to jurisdictional bar). Respondents' arguments to the contrary are utterly without merit. There is an inter-circuit split which this Court should resolve.

III. LEFT UNCHECKED, THE UNCERTAINTY CREATED BY THE NINTH CIRCUIT'S DECISION WILL HAVE FAR-REACHING IMPLICATIONS.

The Ninth Circuit's decision, if allowed to stand in light of its conflict with *Salfi*, *Ringer*, *Chilicky*, and *Bodimetric*, would permit Medicare plaintiffs remedies not contemplated by Congress. To proceed directly to state court, a shrewd Medicare plaintiff need only style his complaint in such a way as to avoid discussion of the payment of Medicare benefits. By

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[1] Respondents' contention that no other federal court has addressed the jurisdictional bar in the HMO context is patently false. In *Grijalva v. Shalala*, 946 F. Supp. 747, 750-55 (D. Ariz. 1996), the court held that an HMO is the Secretary's agent for purposes of administering Medicare benefits and is thus subject to the jurisdictional bar of § 405(h).

opening this large loophole, the Ninth Circuit has created an exception to § 405(h) that would allow artful pleading to void the rule of law.

The uniform resolution of the exploding Medicare population's claims is essential to the proper functioning of the federal Medicare program and Medicare's continued expansion into managed health care programs. Medicare HMOs are currently enrolling over 80,000 new members per month. *Washington Health Week*, No. 5, Vol. 5, Atlantic Information Services, Inc., Feb. 3, 1997. The Ninth Circuit's holding could impose significant additional costs (and, therefore, diminished benefits) if benefit decisions by Medicare HMOs are subject to second guessing by state court juries for consequential and punitive damages. For this important reason alone, this Court's intervention is necessary to ensure faithful application of Congress' mandate in § 405(h).

IV. MEDICALLY APPROPRIATE AIR AMBULANCE SERVICES ARE COVERED BY MEDICARE AND CLAIMS THEREFOR "ARISE UNDER" THE MEDICARE ACT.

Respondents' principal argument is that "[b]ecause the facts in this case [create] a potential that the benefits sought were in excess of those mandated by Medicare, review [by this Court] is not warranted." *Respondents' Brief in Opposition*, at 10. This new argument, never addressed below -- that air transportation benefits are supplemental Medicare benefits not subject to the jurisdictional bar -- is not supported by the applicable regulations. Those regulations quite clearly provide that medically-appropriate air ambulance services *are* covered services under Medicare.

Under the regulations, enrollment eligibility into a Medicare HMO plan, such as Aetna's Senior Choice plan, is limited to individuals entitled to receive benefits at least under Part B of the Medicare Act. 42 C.F.R. § 417.420(a). Part B benefits are the sole source of payment for medically-appropriate ambulance services, including air ambulance services. 42 C.F.R. § 410.40(b). In turn, "[m]edically appropriate air ambulance transportation is a covered service regardless of the State or region in which it is rendered" to an eligible beneficiary. *Medicare Carriers Manual, Part 3 (HCFA-Pub. 14-3)*, § 2120.4; *Medicare Intermediary Manual, Part 3 (HCFA-Pub. 13-3)*, § 3114(C)(11).

Respondents, simply are hoist by their own petard. Because "[m]edically appropriate air ambulance transportation is a covered service," the major premise for Respondents argument is exploded and, even by their own terms, one must conclude that the denial of a request for air ambulance transportation is subject to the jurisdictional bar of § 405(h). *See Klementowski v. Secretary, Department of Health and Human Services*, 801 F. Supp. 1022 (W.D.N.Y. 1992) (detailing the administrative procedures the claimant exhausted before seeking a judicial determination that air ambulance services are covered by Medicare).

CONCLUSION

For the reasons stated, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

Stuart M. Gerson
Counsel of Record
David M. Pierce
Epstein Becker & Green, P.C.
1227 25th Street, N.W.
Washington, D.C. 20037
(202) 861-0900
Counsel for Petitioners